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ADMINISTRATIVE LAW JUDGE CORPS ACT

SEPTEMBER 19 (legislative day, SEPTEMBER 10), 1990.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 594]

The Committee on the Judiciary, having considered S. 594 to establish an independent corps of administrative law judges to operate under the executive branch of government, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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I. PURPOSE

The purpose of this bill is to establish an independent corps of administrative law judges within the executive branch of govern-

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ment. The bill is designed to address two critical issues which face our Nation. First, an independent corps is vital to the continued impartial resolution of issues and decision of cases arising under the Administrative Procedure Act. Second, this bill streamlines the Federal bureaucracy in order to better meet the needs of the people of the United States. For these reasons, legislation needs to be adopted to improve this Nation's administrative system of justice.

II. Legislative History

Earlier versions of this bill were introduced during the 98th, 99th, and 100th sessions of Congress. Hearings were previously held on similar versions of this legislation in earlier sessions. Responding to previous criticisms, this bill was substantially altered prior to its introduction in the 101st Congress.

On March 15, 1989, Senator Heflin joined by Senators Shelby, Specter, DeConcini, Sarbanes, Sanford, Pryor, Heinz, and Metzenbaum, introduced S. 594.

The Subcommittee on Courts and Administrative Practice held a hearing on S. 594 on June 13, 1989. Subsequently, on July 22, 1989, the subcommittee reported the bill, with amendments, to the full Judiciary Committee without recommendation.

The Judiciary Committee considered this legislation during its business meeting on April 26, 1990.

On June 27, 1990, the Judiciary again considered this legislation. Senator Grassley offered an amendment in the nature of a substitute which was defeated. Senator Heflin then offered an amendment in the nature of a substitute which was agreed to and ordered reported favorably by the committee.

III. Discussion

A. INTRODUCTION

Since the enactment of the Administrative Procedure Act on June 11, 1946, there have been gradual changes in the act to meet the changing demands of our society. This legislation is designed to make another important change to protect the decisional independence of administrative law judges (ALJ's). This legislation would establish a unified corps of ALJ's within the executive branch of government. Under this bill, all ALJ's would be removed from the various departments and agencies of government and would be combined in a unified corps. This change represents a streamlining and improvement in the administrative judicial system.

B. DESCRIBING THE NEED FOR CHANGE

Administrative law judges are being called upon to play an increasingly larger and more critical role in the adjudicative system in the United States. ALJ's are called upon to review and evaluate a wide variety of issues ranging form the merits of a social security disability claim to the validity of extensive regulations governing the securities industry. They often make important initial decisions which profoundly influence the administration of justice.

Currently, ALJ's are employees of various departments and agencies within the Federal Government. These administrative law judges function as decisionmakers for the agencies in disputes between private parties and the Federal Government. The decisions of administrative law judges generally are reviewed by the respective agencies and departments, and can be overturned by the government. Generally, upon an agency making a final decision, an injured private party then can file a lawsuit in Federal court to dispute the legality of the government's decision. Clearly, ALJ's are a vital cog in the execution of administrative decisionmaking in the Federal Government.

Since ALJ's are called upon to make crucial decisions which often have important effects on private parties, they must be shielded to protect the integrity of their role in government. These ALJ's provide a unique service. They must be aware of and follow the legitimate policy decisions dictated by the executive branch. At the same time, they must be impartial factfinders who make unbiased decisions based on law. It has been said that administrative law judges are required to be the conscience of an administrative agency, and are required to make difficult and sometimes unpopular decisions. For these reasons, the independence of administrative law judges must be a vital concern of government, and as a result, this independence must be jealously guarded.

Since the establishment of the Administrative Procedure Act and the formal beginnings of the administrative law judge scheme, the ranks of the ALJ's have increased dramatically. Today, there are well over 1,000 ALJ's found in 27 different departments and agencies. ALJ's increasingly being asked to make critical decisions substantially effecting American citizens and companies. In fact, the Supreme Court has noted, "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is functionally comparable to that of a judge." *Butz* v. *Economu,* 438 U.S. 478, 513 (1978). Given the increase in growth and responsibility over the last half century, it is easy to perceive why there have been growing problems in identifying the proper role that administrative judges should have in the adminisrative process.

Some change in the law have been made to provide monetary and job security protections to ALJ's. These efforts have provided some degree of protection from retribution by the agencies. See, 5 U.S.C. sections 421, 554, 3105, 5362, and 7521. But, these efforts have not provided judges with complete decision autonomy. As long as ALJ's are employees of an agency, an agency can use subtle measures such as promotional opportunities, office space, and support staff, to coerce and improperly reward or punish these important agency decisionmakers. A classic example of this type of coercion was felt by administrative law judges in the Social Security Administration which resulted in a lawsuit against the agency. See, *Association of Administrative Law Judges* v. *Heckler,* 594 F.Supp. 1132 (D.D.C. 1984). The possibility that such coercion may exist in the administrative law system points out that greater decision autonomy should be a goal which is vigorously pursued for all ALJ's throughout the Federal Government.

The establishment of an independent corps of administrative law judges is not a unique concept. In fact, this type of legislation was first implemented in a number of States, and has been very successful. The individual States have been leaders in adapting and streamlining the administrative process to meet the changing needs of the American public. The adoption of similar Federal legislation merely builds upon the successful experiences of the States.

A final consideration which argues in favor of greater independence for ALJ's is the issue of public perception. For an individual who faces the daunting prospect of being accused by a Federal agency of illegal activities, the fact that an administrative law judge who is an employee of that agency is hearing their case, is hardly reassuring. The realities of the everyday world indicate that the key to public satisfaction and confidence in judicial decisionmaking is the issue of decisional independence. The creation of an independent corps of administrative law judges is likely to have the beneficial effect of greater public satisfaction with the administrative law system.

C. DESCRIPTION OF THE ALJ CORPS

Generally, this bill would establish an indpendent corps of administrative law judges under the executive branch. The Corps would be governed by a chief administrative law judge. Further, the Corps would be divided into eight divisions, with each division governed by a division chief administrative law judge. The chief and division chief ALJ's would be Presidential appointments, by and with the advise and conset of the United States Senate.

The chief and division chief ALJ's would form a Council. The Council of the Corps would be the policymaking body for the Corps. The Council would have the authority to assign judges to divisions, appoint persons as administrative law judges, prescribe rules of practice and procedure for the Corps, issue appropriate rules and regulations for the efficient conduct of the Corps, and generally manage the day-to-day operation of the Corps. The establishment of a Council, whose membership requires Presidential appointment, should ensure responsiveness to an administration's policies and directives. On the other hand, under this bill these appointments must be from current administrative law judges, thus attempting to insure that the Council members will be responsive to the unique needs and requirements of administrative law judges. A final benefit of the Council system is found in its authority to prescribe rules of practice. Currently, an attorney who practices before a Social Security Administration ALJ may have to substantially alter his pleadings and practice methodology if that attorney wishes to practice before another agency of the Federal Government. Clearly, giving the council the authority to establish uniform rules and methodologies for practicing before all administrative law judges will help to streamline and improve the administrative law judicial system.

Any criticism which continues to haunt this legislation is that the Federal Government's administrative decisionmaking system will be severely disrupted. This argument is hollow and displays a

lack of understanding regarding the administrative law system. This legislation will simply provide that the agency decisionmaking function, currently carried out by an administrative law judge, will take place in an independent corps outside of the respective agency.

The bill provides that the Corps will be divided into eight divisions. These divisions are structured so that a high degree of legal expertise will be maintained in each division. During the Judiciary Committee's consideration of this bill, a suggested listing of what current agency's cases might fall into which division was developed. This suggested listing is as follows:

Division 1: Communications, Public Utility, and Transportation Regulation
- Federal Communications Commission
- Federal Energy Regulatory Commission
- Federal Maritime Commission
- National Transportation Safety Board
- Nuclear Regulatory Commission
- Transportation Department
  - Office of the Secretary
  - U.S. Coast Guard
- Interstate Commerce Commission

Division 2: Safety and Environmental Regulation
- Environmental Protection Agency
- Federal Mine Safety and Health Review Commission
- Food and Drug Administration
- Interior Department
- Occupational Safety and Health Review Commission

Division 3: Labor
- Labor Department

Division 4: Labor Relations
- National Labor Relations Board
- Federal Labor Relations Authority
- Merit Systems Protection Board

Division 5: Health and Benefits Programs
- Health and Human Services Department
  - Departmental Appeals Board
  - Social Security Administration

Division 6: Securities, Commodities, and Trade Regulation
- Commodity Futures Trading Commission
- Federal Trade Commission
- Securities and Exchange Commission
- U.S. International Trade Commission
- Agriculture Department

Division 7: General Programs
- Education Department
- Housing and Urban Development Department
- Justice Department
  - Drug Enforcement Administration
  - Immigration Review
- U.S. Postal Service
- Commerce Department

Division 8: Financial Services Institutions

ALJ's serving the appropriate agencies and departments under the FIRREA legislation, and according to section 916 of that act.

These suggested divisions should only be a guide for those responsible for initially establishing the Corps, however, these suggestions serve to illustrate the intentions of the committee regarding the division of labor within each division.

The committee expects current administrative law judges to continue to hear and adjudicate the same types of cases which they presently decide. Further, the bill provides that each ALJ will be assigned to cases within their division, by their division chief, after taking into consideration specialization, training, workload, and conflicts of interest. Such assignment of cases should mitigate any fear that a loss of decision expertise will arise from the establishment of an independent corps. The bill also provides for the continued training and education of judges, and explicitly gives authority for ALJ's to continue to be assigned to act as special masters under Federal Rule of Civil Procedure 53(a). These provisions recognize that the establishment of a Corps should not have dramatic and lasting effects on the administrative adjudicative function of ALJ's.

In addition to the establishment of the Corps, the bill provides other protections to maintain the quality of ALJ's and their decisions. The bill provides that the Corps would continue to make appointments of ALJ's from a register of qualified candidates maintained by the Office of Personnel Management. Further, in order for an ALJ to be involuntarily reassigned to a new permanent duty station, that ALJ must receive a written explanation from the Council stating that such a move is required in order to meet substantial changes in workloads. Also, the bill contains provisions for the removal and discipline of administrative law judges. The bill contains specific protections and provides that they may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty. The bill also provides for the removal of ALJ's due to physical or mental disability. These protections will enhance and ensure that ALJ's are provided the necessary balance of independence tempered with proper administrative control.

Finally, the bill contains provisions for the smooth transition of authority, regarding ALJ's, from the agencies to the Corps. A key provision of this bill is that within 2 years of its enactment, the bill requires a study by the Administrative Conference of the United States to suggest proposed legislation to further streamline the administrative decisionmaking process. The bill does not go into effect until 120 days after enactment.

D. CONCLUSION

The committee believes that this legislation is a proper and timely response to updating the Administrative Procedure Act. This bill addresses two critical issues which face our Nation. First, the bill assures that the impartial resolution of administrative law cases is an important and necessary goal. Second, this bill streamlines the Federal bureaucracy, especially the functioning of administrative law judges, in order to better meet the needs of the people

of the United States. For these reasons, the committee supports the passage of this legislation.

IV. Vote of the Committee

During consideration of S. 594, the committee conducted two rollcall votes. The first rollcall vote was on the adoption of an amendment in the nature of a substitute which was offered by Senator Grassley. The Grassley amendment failed by a vote of 5 to 8.

The vote on the Grassley amendment was as follows:

YEAS—5	NAYS—8
Thurmond	Biden
Hatch	Metzenbaum
Simpson	DeConcini
Grassley	Leahy
Humphrey	Heflin
	Simon
	Kohl
	Specter

The Committee on the Judiciary, with a quorum being present, approved an amendment in the nature of a substitute offered by Senator Heflin and, by a vote of 9 to 5, ordered the bill S. 594 favorably reported.

The vote on the Heflin amendment was as follows:

YEAS—9	NAYS—5
Biden	Thurmond
Kennedy	Hatch
Metzenbaum	Simpson
DeConcini	Grassley
Leahy	Humphrey
Heflin	
Simon	
Kohl	
Specter	

V. Text of S. 594, as Reported

[101st Cong., 2d sess.]

A BILL To establish a specialized corps of judges necessary for certain federal proceedings required to be conducted, and for other pruposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Law Judge Corps Act".

ESTABLISHMENT OF ADMINISTRATIVE LAW JUDGE CORPS

Sec. 2. (a) Chapter 5 of title 5, United States Code, is amended by adding at the end thereof a new subchapter IV to read as follows:

"SUBCHAPTER IV—ADMINISTRATIVE LAW JUDGE CORPS

"§ 581. Definitions

"For the purposes of this subchapter—

"(1) 'agency' means an authority referred to in section 551(1) of this title;

"(2) 'Corps' means the Administrative Law Judge Corps of the United States established under section 582 of this title;

"(3) 'administrative law judge' means an administrative law judge appointed under section 3105 of this title on or before the effective date of the Administrative Law Judge Corps Act or under section 586 of this title after such effective date;

"(4) 'chief judge' means the chief administrative law judge appointed and serving under section 583 of this title;

"(5) 'Council' means the Council of the Administrative Law Judge Corps established under section 585 of this title;

"(6) 'Board', unless otherwise indicated, means the Complaints Resolution Board established under section 588 of this title; and

"(7) 'division chief judge' means the chief administrative law judge of a division appointed and serving under section 584 of this title.

"§ 582. Establishment; membership

"(a) There is established an Administrative Law Judge Corps consisting of all administrative law judges, in accordance with the provisions of subsection (b). Such Corps shall be located in Washington, D.C.

"(b) An administrative law judge serving as such on the date of the commencement of the operation of the Corps shall be transferred to the Corps as of that date. An administrative law judge who is appointed on or after the date of the commencement of the operation of the Corps shall be a member of the Corps as of the date of such appointment.

"§ 583. Chief administrative law judge

"(a) The chief administrative law judge shall be the chief administrative officer of the Corps and shall be the presiding judge of the Corps. The chief judge shall be appointed by the President, by and with the advice and consent of the Senate. The chief judge must be an administrative law judge who has served as an administrative law judge for at least five years preceding the date of appointment as chief judge. The chief judge shall serve for a term of five years or until a successor is appointed and qualifies to serve, whichever is earlier. A chief judge may be reappointed upon the expiration of his term, by and with the advice and consent of the Senate.

"(b)(1) If the office of chief judge is vacant, the division chief judge who is senior in length of service as a member of the Council shall serve as acting chief judge until such vacancy is filled.

"(2) If two or more division chief judges have the same length of service as members of the Council, the division chief judge who is senior in length of service as an administrative law judge shall serve as such acting chief judge.

"(c) The chief judge shall, within ninety days after the end of each fiscal year, make a written report to the President and the Congress concerning the business of the Corps during the preceding fiscal year. The report shall include information and recommenda-

tions of the Council concerning the future personnel requirements of the Corps.

"(d) After serving as chief judge, such individual may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 588 of this title.

"§ 584. Divisions of the Corps; division chief judges

"(a) Each judge of the Corps shall be assigned to a division by the Council, pursuant to section 585. The assignment of a judge who was an administrative law judge on the date of commencement of the operation of the Corps shall be made after consideration of the areas of specialization in which the judge has served. Each division shall be headed by a division chief judge who shall exercise administrative supervision over such division.

"(b) The divisions of the Corps shall be as follows:

"(1) Division of Communications, Public Utility, and Transportation Regulation.

"(2) Division of Safety and Environmental Regulation.

"(3) Division of Labor.

"(4) Division of Labor Relations.

"(5) Division of Health and Benefits Programs.

"(6) Division of Securities, Commodities, and Trade Regulation.

"(7) Division of General Programs.

"(8) Division of Financial Services Institutions.

"(c)(1) The division chief judge of each division set forth in subsection (b) shall be appointed by the President, by and with the advice and consent of the Senate.

"(2) To be eligible for appointment as a division chief judge, an individual must have served as an administrative law judge for at least five years and should possess experience and expertise in the specialty of the division to which such person is an appointee.

"(3) Division chief judges shall be appointed for five-year terms except that of those division chief judges first appointed, the President shall designate two such individuals to be appointed for five-year terms, three for four-year terms, and two for three-year terms.

"(4) Any division chief judge appointed to fill an unexpired term shall be appointed only for the remainder of such predecessor's term, but may be reappointed as provided in paragraph (5).

"(5) Any division chief judge may be reappointed upon the expiration of his term if nominated for such appointment pursuant to the provision of this title.

"(6) Any judge, after serving as division chief judge may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 588 of this title.

"§ 585. Council of the Corps

"(a) The policymaking body of the Corps shall be the Council of the Corps. The chief judge and the division chief judges shall constitute the Council. The chief judge shall preside over the Council. If the chief judge is unable to be present at a meeting of the Coun-

cil, the division chief judge who is senior in length of service as a member of such Council shall preside.

"(b) One-half of all of the members of the Council shall constitute a quorum for the purpose of transacting business. The affirmative vote by a majority of all the members of the Council shall be required to approve a matter on behalf of the Council. Each member of the Council shall have one vote.

"(c) Meetings of the Council shall be held at least once a month at the call of the chief judge or by the call of one-third or more of the members of the Council.

"(d) The Council is authorized—

"(1) to assign judges to divisions and transfer or reassign judges from one division to another, subject to the provisions of section 586 of this title;

"(2) to appoint persons as administrative law judges under section 586 of this title;

"(3) to file charges seeking adverse action against an administrative law judge under section 588 of this title;

"(4) subject to the provisions of subsection (e), to prescribe, after providing an opportunity for notice and comment, the rules of practice and procedure for the conduct of proceedings before the Corps, except that, with respect to a category of proceedings adjudicated by an agency before the effective date of the Administrative Law Judge Corps Act, the Council may not amend or revise the rules of practice and procedure prescribed by that agency during the two years following such effective date without the approval of that agency, and any amendments or revisions made to such rules shall not affect or be applied to any pending action;

"(5) to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps and the implementation of this subchapter, including the assignment of cases to administrative law judges;

"(6) subject to the civil service and classification laws and regulations, to select, appoint, employ, and fix the compensation of the employees (other than administrative law judges) that such Council deems necessary to carry out the functions, powers, and duties of the Corps and to prescribe the authority and duties of such employees;

"(7) to establish, abolish, alter, consolidate, and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices;

"(8) to procure temporary and intermittent services under section 3109 of this title;

"(9) to enter into, to the extent or in such amounts as are authorized in appropriation Acts, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), contracts, leases, cooperative agreements, or other transactions that may be necessary to conduct the business of the Corps;

"(10) to delegate any of the chief judge's functions or powers with the consent of the chief judge, or whenever the office of such chief judge is vacant, to one or more division chief judges

or other employees of the Corps, and to authorize the redelegation of any of those functions or powers;

"(11) to establish, after consulting with an agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the specialized field of law of that agency;

"(12) to make suitable arrangements for continuing education and training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced; and

"(13) to determine all other matters of general policy of the Corps.

"(e) The Council shall select an official seal for the Corps which shall be officially noticed.

"§ 586. Appointment and transfer of administrative law judges

"(a) After the initial establishment of the Corps, the Council shall appoint new or additional judges as may be necessary for the efficient and expeditious conduct of the business of the Corps. Appointments shall be made from a register maintained by the Office of Personnel Management under subchapter I of chapter 33 of this title. Upon request by the chief judge, the Office of Personnel Management shall certify enough names from the top of such register to enable the Council to consider five names for each vacancy. Notwithstanding section 3318 of this title, a vacancy in the Corps may be filled from the highest five eligible individuals available for appointment on the certificate furnished by the Office of Personnel Management.

"(b) A judge of the Corps may not perform or be assigned to perform duties inconsistent with the duties and responsibilities of an administrative law judge.

"(c) A judge of the Corps on the date of commencement of the operation of the Corps may not thereafter be involuntarily reassigned to a new permanent duty station if such station is beyond commuting distance of the duty station which is the judge's permanent duty station on that date, unless the Council determines and submits a written explanation to the judge stating that such reassignment is required to meet substantial changes in workloads. A judge may be temporarily detailed, once in a 24-month period, to a new duty station at any location, for a period of not more than 120 days.

"§ 587. Jurisdiction

"(a) All types of cases, claims, actions and proceedings heretofore held before administrative law judges shall be referred to the Corps, for adjudication on the record after an opportunity for a hearing.

"(b) An administrative law judge who is a member of the Corps shall hear and render a decision upon—

"(1) every case of adjudication subject to the provisions of section 554 of this title;

"(2) every case in which hearings are required by law to be held in accordance with section 553, 554, or 556 of this title; and

"(3) every other case referred to the Corps by an agency or court in which a determination is to be made on the record after an opportunity for a hearing.

"(c) When a case under subsection (b) arises, it shall be referred to the Corps. Under regulations issued by the Council the case shall be assigned to a Division. The appropriate Division Chief shall assign cases to judges, taking into consideration specialization, training, workload, and conflicts of interest.

"(d) Federal agencies and courts are hereby authorized to refer any appropriate case either—

"(1) to the Corps; or

"(2) to a specific administrative law judge, with the approval of the majority of the Council, to serve as a special master pursuant to the provisions of Rule 53(a) of the Federal Rules of Civil Procedure.

"(e) Compliance with this subchapter shall satisfy any and all requirements imposed under section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989.

"§ 588. Removal and discipline

"(a) Except as provided in subsection (b) of this section—

"(1) an administrative law judge may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty, but may be removed for physical or mental disability; and

"(2) an action specified in paragraph (1) of this subsection may be taken against an administrative law judge only after the Council has filed a notice of adverse action against the administrative law judge with the Merit Systems Protection Board and the Board has determined, on the record after an opportunity for a hearing before the Board, that there is good cause to take such action.

"(b) Subsection (a) does not apply to an action initiated under section 1206 of this title.

"(c) Under regulations issued by the Council, a Complaints Resolution Board shall be established within the Corps to consider and to recommend appropriate action to be taken when a complaint is made concerning the official conduct of a judge. Such complaint may be made by any interested person, including parties, practitioners, the chief judge, and agencies.

"(d) The Board shall consist of two judges from each division of the Corps who shall be appointed by the Council. The chief judge and the division chief judges may not serve on such Board.

"(e) A complaint of misconduct by an administrative law judge must be made in writing. The complaint shall be filed with the chief judge, or it may be originated by the chief judge on his own motion. The chief judge shall refer the complaint to a panel consisting of three members of the Board selected by the Council, none of whom may be serving in the same division as the administrative law judge who is the subject of the complaint. The administrative law judge who is the subject of the complaint shall be given notice

of the complaint and the composition of the panel. The administrative law judge may challenge peremptorily not more than two members of the panel. The Council shall replace a challenged member with another member of the Board who is eligible to serve on such panel.

"(f) The panel shall inquire into the complaint and shall render a report thereon to the Council. A copy of the report shall be provided concurrently to the administrative law judge who is the subject of the complaint. The report shall be advisory only.

"(g) The proceedings, deliberations, and reports of the Board and the contents of complaints under this section shall be treated as privileged and confidential. Documents considered by the Board and reports of the Board are exempt from disclosure or publication under section 552 of this title. Section 552b of this title does not apply to the Board.".

(b) The table of sections for chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER IV—ADMINISTRATIVE LAW JUDGE CORPS

"Sec.
"581. Definitions.
"582. Establishment; membership.
"583. Chief administrative law judge.
"584. Divisions of the Corps; division chief judges.
"585. Council of the Corps.
"586. Appointment and transfer of administrative law judges.
"587. Jurisdiction.
"588. Removal and discipline."

AGENCY REVIEW STUDY AND REPORT

SEC. 3. The chief administrative law judge of the Administrative Law Judge Corps of the United States shall make a study of the various types and levels of agency review to which decisions of administrative law judges are subject. A separate study shall be made for each division of the Corps. The studies shall include monitoring and evaluating data and shall be made in consultation with the division chief judges, the Chairman of the Administrative Conference of the United States, and the agencies that review the decisions of administrative law judges. Not later than two years after the effective date of this Act, the Council shall report to the President and the Congress on the findings and recommendations resulting from the studies. The report shall include recommendations, including recommendations for new legislation, for any reforms that may be appropriate to make review of administrative law judges' decisions more efficient and meaningful and to accord greater finality to such decisions.

TRANSITION AND SAVINGS PROVISIONS

SEC. 4. (a) There are transferred to the administrative law judges of the Administrative Law Judge Corps established by section 582 of title 5, United States Code (as added by section 2 of this Act), all functions performed on the day before the effective date of this Act by the administrative law judges appointed under section 3105 of such title before the effective date of this Act.

(b) With the consent of the agencies concerned, the Administrative Law Judge Corps of the United States may use the facilities and the services of officers, employees, and other personnel of agencies from which functions and duties are transferred to the Corps for so long as may be needed to facilitate the orderly transfer of those functions and duties under this Act.

(c) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, in connection with the functions, offices, and agencies transferred by this Act, are, subject to section 1531 of title 31, United States Code, correspondingly transferred to the Corps for appropriate allocation.

(d) The transfer of personnel pursuant to subsection (b) of this section shall be without reduction in pay or classification for one year after such transfer.

(e) The Director of the Office of Management and Budget, at such time or times as the Director shall provide, may make such determinations as may be necessary with regard to the functions, offices, agencies, or portions thereof, transferred by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, offices, agencies, or portions thereof, as may be necessary to carry out the provisions of this Act.

(f) All orders, determinations, rules, regulations, certificates, licenses, and privileges which have been issued, made, granted, or allowed to become effective in the exercise of any duties, powers, or functions which are transferred under this Act and are in effect at the time this Act becomes effective shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrative Law Judge Corps of the United States or a judge thereof in the exercise of authority vested in the Corps or its members by this Act, by a court of competent jurisdiction, or by operation of law.

(g) Except as provided in subsections (d)(5) and (e) of section 585 of title 5, United States Code, this Act shall not affect any proceeding before any department or agency or component thereof which is pending at the time this Act takes effect. Such a proceeding shall be continued before the Administrative Law Judge Corps of the United States or a judge thereof, or, to the extent the proceeding does not relate to functions so transferred, shall be continued before the agency in which it was pending on the effective date of this Act.

(h) No suit, action, or other proceeding commenced before the effective date of this Act shall abate by reason of the enactment of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act

and subchapter IV of title 5, United States Code (as added by section 2 of this Act).

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 6. Title 5, United States Code, is amended as follows:

(1) Section 573(b) is amended by redesignating paragraphs (4), (5), and (6) as paragraphs (5), (6), and (7), respectively, and inserting a new paragraph (4) to read as follows:

"(4) the chief administrative law judge of the Administrative Law Judge Corps of the United States;".

(2) Section 3105 is amended to read as follows:

"§ 3105. Appointment of administrative law judges

"Administrative law judges shall be appointed by the Council of the Administrative Law Judge Corps pursuant to section 586 of this title.".

(3) Section 3344 and any references to such section are repealed.

(4) The table of sections for chapter 33 is amended by striking out the item relating to section 3344.

(5) The table of contents of this title and of chapter 5 thereof each are amended by inserting after the item relating to section 559 the following:

(6)(A) Subchapter III of chapter 75 of title 5, United States Code, is repealed.

(B) The table of sections at the beginning of chapter 75 of title 5, United States Code, is amended—

(i) by striking out the items relating to subchapter III and section 7521;

(ii) by redesignating "Subchapter IV" and all references to such subchapter as "Subchapter III"; and

(iii) by redesignating "Subchapter V" and all references to such subchapter as "Subchapter IV".

OPERATION OF THE CORPS

SEC. 7. Operation of the Corps shall commence on the date the first chief administrative law judge of the Corps takes office.

CONTRACT DISPUTES ACT

SEC. 8. Nothing in this Act or the amendments made by this Act shall be deemed to affect any agency board established pursuant to the Contract Disputes Act (41 U.S.C. 601), or any other person designated to resolve claims or disputes pursuant to such Act.

EFFECTIVE DATE

SEC. 9. Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the date of enactment.

VI. Section-by-Section Analysis

SECTION 1

Section 1 establishes the short title of this act as the "Administrative Law Judge Corps Act."

SECTION 2

Section 2 of the bill creates a new subchapter in chapter 5 of title 5 of the United States Code. The sections of this new subchapter are described as follows:

Section 581

Section 581 provides for definitions to be used for purposes of the subchapter. This section explicitly provides that the definition of an administrative law judge is to include current administrative law judges who are appointed pursuant to section 3105 of title 5, prior to enactment of this legislation.

Section 582

This section provides that the Administrative Law Judge Corps shall be headquartered in Washington, DC. This section further provides that any administrative law judge appointed on or after the date of commencement of this act shall be a member of the Corps.

Section 583

This section provides for the establishment of a chief administrative law judge, and for the authority vested in that office.

Section (a) prescribes that the chief administrative law judge will be the chief administrative officer of the Corps. This subsection provides that the President shall appoint the chief judge, by and with the advise and consent of the Senate. This subsection further provides that the term of such office shall generally be 5 years with a possibility for reappointment.

Section (b) provides for a division chief judge to assume the responsibilities of acting chief judge until such vacancy is filled.

Section (c) provides that the chief judge will have the responsibility of providing the President and Congress a written report concerning the business of the Corps and any recommendations of the Council concerning future personnel requirements.

Section (d) provides that after an individual's tenure as chief judge, that person may continue as an administrative law judge.

Section 584

This section provides for the breakdown of the Corps into divisions.

Section (a) provides that each administrative law judge will be assigned to a division by the Council of the Corps. This section further provides for a division chief judge to provide administrative supervision over each division.

Section (b) outlines the eight statutory divisions of the Corps. An additional Division of Financial Services was added since introduction in order to conform to the requirements of the recent savings

and loan legislation, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

Section (c) provides that each division chief judge will be appointed by the President, with the advise and consent of the Senate. This section further provides for the requirements of such office and the length of term for such office. This section also provides that an administrative law judge who has served as a division chief may return to his or her judicial capacity.

Section 585

This section establishes the Council of the Corps, and the general operating outline for the workings of the Council.

Section (a) states that the Council will be the policymaking body for the Corps. The Council will further consist of the chief and division chief administrative law judges.

Section (b) provides for a requirement of a quorum of the Council in order to conduct business, and that a majority of the members of the Council are required in order to adopt an official position. Also, this section provides that each member of the Council shall have one vote.

Section (c) provides for the regular meetings of the Council.

Section (d) outlines the authority of the Council.

Subsections (1) and (2) provide the authority of the Council to appoint administrative law judges, and to assign and reassign administrative law judges to specific divisions of the Corps.

Subsection (3) authorizes the Council to file charges under the removal and discipline section of this act.

Subsection (4) provides authority for the Council to establish rules of practice and procedure for the Corps. The purpose of such rules would be to streamline the administrative process and allow for greater uniformity. This subsection further provides that the Council may not preempt existing agency rules in order to allow the smooth transfer of cases and procedural rulemaking authority from the agencies to the Corps.

Subsection (5) allows for additional authority for the Council to establish rules and regulations for the day-to-day administration of the Corps.

Subsection (6) provides general authority for the Council to appoint, employ, and fix the compensation of employees of the Corps who are not administrative law judges.

Subsection (7) authorizes the Council to establish regional field offices which may be necessary to carry out the responsibilities of the Corps.

Subsections (8) and (9) provide the Council the authority to make various procurements and enter into contracts.

Subsection (10) authorizes the delegation of functions within the Corps.

Subsection (11) authorizes the Council to establish educational programs for the benefit of administrative law judges. This function should be highly beneficial in broadening the knowledge of administrative law judges in highly technical fields in which they may have to make future decisions. This section further requires the Council to work with the various agencies in establishing these educational systems for administrative law judges.

Subsection (12) provides that the Council can provide training to the employees of the Corps who are not administrative law judges.

Subsection (13) establishes the authority of the Council to determine the general policy matters for the Corps.

Section (e) provides that the Council must select an official seal for the Corps.

Section 586

This section provides for the appointment and transfer of administrative law judges.

Section (a) requires that the appointment of new administrative law judges come from a register of qualified applicants maintained by the Office of Personnel Management. Upon the request of the chief judge, the Office of Personnel Management must provide at least five names for each vacancy which may arise.

Section (b) provides that an adminsitrative law judge may not be required to perform duties inconsistent with the duties of an administrative law judge.

Section (c) provides protections for judges who may necessarily be reassigned a new permanent duty station. If the Council finds a transfer is necessary, then the administrative law judge must recieve a written explanation which states that such a reassignment is necessary in order to meet substantial changes in workloads. This section also provides that a judge may be temporarily detailed to a new duty station.

Section 587

Sections (a) and (b) provide the general jurisdictional authority of the Corps to act. This section provides for administrative law judges within the Corps to make the decisions required of administrative law judges under the Administrative Procedure Act. Section (a) has been modified since introduction to make clear the authority of administrative law judges under the Corps to make decisions for the Social Security Administration when these adjudications are on the record after an opportunity for a hearing.

Section (c) provides the mechanism for the assignment of cases to individual judges. Once a case within the jurisdiction of the Corps is sent from an agency, Council regulations should then assign that case to a particular division. The Division Chief is then given the responsibility to assign cases to individual judges. The committee foresees that such assignments should be handled in as random a method as feasible after the Division Chief takes into consideration specialization, training, workload and conflicts of interest of individual judges within that division.

Section (d) provides explicit authority for administrative law judges to continue to be assigned as special masters in cases before the Federal district judges.

Finally, section (e) explicitly asserts that the Corps satisfies the requirements of section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

Section 588

Section (a) establishes the rules and procedures for the removal and discipline of administrative law judges.

—Subsection (a) generally provides that administrative law judges can only be disciplined for certain specified reasons, namely misconduct or neglect of duty, or in some circumstances for physical or mental disability. Such discipline can take effect only upon a decision of the Merit Systems Protection Board, and only after the Council has filed notice of adverse action against an administrative law judge.

—Subsection (b) provides the only exception to section (a) and notes that administrative law judges are subject to section 1206 of title 5, United States Code.

—Subsection (c) establishes a Complaints Resolution Board within the Corps, and that such Board receive and make recommendations upon complaints made by any interested party concerning the official conduct of an administrative law judge.

—Subsection (d) provides for the membership of the Board to consist of two judges from each division of the Corps who are appointed by the Council.

—Subsection (e) states the mechanisms for how a complaint is to be handled by the chief judge, the Council, and the Board. This section provides for the establishment of a panel of the Board consisting of three Board members. This section further provides protection for the administrative law judge who is subject to scrutiny as a result of a filed complaint by allowing the preemptory challenge to two members of the initial panel.

—Subsection (f) requires the appointed panel to review the complaint and to provide a report to the Council. Such a report must also be provided to the administrative law judge who is subject to the complaint, and such report is only advisory.

—Subsection (g) provides for the matters considered by the Complaints Resolution Board to be considered privileged and confidential.

Section (b) provides for amending the table of sections for chapter 5 of title 5, United States Code, to include the provisions concerning the Administrative Law Judge Corps.

SECTION 3

This section requires the chief administrative law judge to conduct a study, with the aid of the Chairman of the Administrative Conference of the United States, on the various types of issues which are within the jurisdiction of the Corps. This review is to result in a report giving recommendations to the President and Congress on reforms which ought to be implemented to facilitate the workings of the Corps. The purpose of this study is to substantially aid the smooth transition of the adjudication process from within the various agencies to the Corps. Such a followup study should enhance the long-term ability of the Corps to properly function.

SECTION 4

This section establishes extensive transitions and savings provisions for the workings of the Corps.

Section (a) provides for the transfer of all functions performed by the various administrative law judges to the Corps as of the effective date of the act.

Section (b) allows for the continued use of agency facilities and personnel for so long as may be needed for the orderly transfer of functions.

Section (c) generally transfers the assets and liabilities currently held by the agencies for carrying out the administrative law judges functions, to the Corps for appropriate allocation.

Section (d) requires that the transfer of personnel under this section shall not result in a reduction of pay or classification for at least one year.

Section (e) generally provides that the Director of the Office of Management and Budget shall have the authority to make final decisions regarding the disposition of assets and liabilities.

Section (f) provides for the continued validity of all orders, determinations, rules, regulations, certificates, licenses, and privileges which had previously been in force prior to the effective date of this legislation, shall continue to be in force until actions are taken to negate the validity of such an action.

Section (g) provides that generally ongoing proceedings shall continue to be in effect after the effective date of this act.

Section (h) provides that no suit, action, or other proceeding commenced prior to the effective date shall be abated by reason of enactment.

SECTION 5

Section 5 provides for the authorization of appropriations to carry out the provisions of this act.

SECTION 6

Section 6 makes a number of miscellaneous and technical amendments to current law regarding the functions of administrative law judges.

SECTION 7

Section 7 states that the operation of the Corps shall commence upon the date that the first chief administrative law judge takes office.

SECTION 8

Section 8 states that this act shall have no affect on any agency board established pursuant to the Contract Disputes Act.

SECTION 9

Section 9 states that except as otherwise provided the effective date of this legislation is 120 days after the date of enactment.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 20, 1990.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 594, the Administrative Law Judge Corps Act, as ordered reported by the Senate Committee on the Judiciary, June 27, 1990. CBO estimates that enactment of the bill would increase federal costs by about $5 million a year.

Bill purpose. S. 594 would create the Administrative Law Judge Corps. Administrative law judges are empowered by the Administrative Procedure Act and other statutes to adjudicate administrative proceedings in federal agencies. This bill would transfer to the corps all administrative law judges [ALJ's] now employed by Federal agencies. The corps would operate under the direction of the Chief Administrative Law Judge, who would be appointed by the President. The bill would create a central policy panel, called the Council of the Corps, to develop procedures and guidelines governing the operations of the corps. S. 594 would authorize the appropriation of the sums necessary to finance the corps.

Estimated cost to the Federal Government. We estimate that the government would incur increased costs, probably around $10 million annually, for administration of the corps. These costs could be partially offset by savings in similar areas at the agencies currently employing judges. It is also possible that, over time, increased flexibility in the use of ALJ's would make possibly some savings that would further offset the increased costs. Taking all of these effects into account, centralizing the government's ALJ's would increase costs by roughly $5 million per year, if offsetting reductions and efficiencies are realized.

Currently, around 1,000 ALJ's are employed by 29 Federal departments and agencies at levels 15, 16, 17, and 18 of the General Schedule. The Social Security Administration [SSA] employs over two-thirds of the judges (nearly 700); the Department of Labor and National Labor Relations Board [NLRB] employ most of the remainder. Based on information provided by the Office of Management and Budget, we estimate that the current cost of ALJ's in the Federal Government is at least $150 million to $200 million annually (an exact figure is not available). This figure is based only on the costs of employing the ALJ's and their immediate support staff, such as secretaries and legal researchers, who number around 1,500.

Presumably, a separate appropriation would be provided for the corps, which would be accompanied by offsetting reductions in the budgets of agencies that currently employ ALJ's. However, the ALJ Corps, as an independent Federal agency, would require its own support structure to manage personnel, budget, logistical, and other administrative matters. We expect that the corps, with around 2,500 employees, would need at least 125 people in administrative positions, at a cost of around $10 million annually; this esti-

mate is based on the cost of these activities at Federal agencies of a similar size and scope. Some of these costs would probably be offset by savings in administrative expenses at the agencies currently employing ALJ's.

We also expect that there would be some one-time costs associated with the creation of the corps. These costs should be less than $500,000, unless a large number of personnel are relocated.

On the other hand, adopting a centralized system could result in savings because it might be possible to handle the existing caseload with fewer judges. Any savings would occur gradually, probably over five to ten years, because reductions in the number of judges would probably occur only through attrition. Although it is difficult to apply strict criteria when determining ideal caseload levels, it is possible that the corps could operate with 30 to 50 fewer judges if caseloads remain at current levels. For example, the caseload at the National Labor Relations Board [NLRB] has dropped by nearly 50 percent over the last 10 years, although the number of judges employed has remained roughly constant at around 100. Nevertheless, if caseloads return to earlier levels, it would not be possible to achieve any significant reductions in the number of judges employed. CBO estimates that a reduction of 30 judges would save around $5 million annually, beginning several years after the bill's enactment, assuming annual costs of $150,000 to $200,000 per judge.

Estimated costs to State and local governments. No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Sieverts, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that this act will not have direct regulatory impact.

IX. MINORITY VIEWS OF MESSRS. GRASSLEY, HATCH, HUMPHREY, SIMPSON, AND THURMOND

The "Administrative Law Judge Corps Act" is misdirected, special interest legislation that, if enacted, would do much to undermine the expertise and efficient operation of our administrative agencies.

I. S. 594 is Radical Legislation at Odds With Administrative Law Principles

We appreciate that over several Congresses, the ALJ Corps concept has been modified to try to accommodate various technical problems and concerns. Senator Heflin has worked hard on it. But the version that the committee has reported is no less radical than its predecessors.

It is radical because it is at odds with the fundamental reason why Congress created specialized administrative agencies in the first place. Over the past 40 years or so, Congress has delegated wide areas of authority to administrative agencies, and these delegations have been upheld by the courts, largely because the agencies were envisioned as policy experts in fields too technical for Congress to micromanage. But this doesn't change the fact that agency decisionmakers—including ALJ's—were to be part of the "Wilsonian model" of an accountable public administration founded on expertise and specialization. This bill is hostile to these time-honored concepts.

Accountability is thrown overboard by S. 594, by increasing the de facto policymaking role of ALJ's who are insulated from political and public accountability. This comes at the expense of agency heads, who are formally vested by the President with decisionmaking responsibilities, and who are accountable to Congress and the public.

The Corps concept stands the principles of expertise and specialization on its head. It is premised on the fact that agency judges are mere fungible commodities. But much as they would like, ALJ's are not generalists, like their "third cousins" on the article III bench.[1] Rather, their task is to sort through their agency's complex and ever-changing statutory and regulatory schemes based on their experience and training and apply the law to the facts before them.

Indeed, the clear trend among even the Federal judiciary is toward specialists over generalists. That is why Congress has created numerous limited-jurisdiction courts, such as the Tax Court, the Claims Court and the Court of International Trade. Congress

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[1] On matters of law and policy, ALJ's are entirely subordinate to the agency. Their decisions are merely advisory until the agency makes the final decision.

did so in large part because it believed that more thoughtful, informed decisions would result.

Familiarity with the law in an administrative law judge is not just a "good" thing; it is essential. That familiarity breeds ALJ and public confidence and coherent decision-writing, fewer appeals, and a better developed record when an appeal is taken. Familiarity with the law is what makes the administrative law system work, providing prompt and informed decisions. Indeed, it is often noted—particularly by the Supreme Court—that courts of appeal give great deference to ALJ findings of fact and interpretations of agency regulations. Why is that? It is because courts are deferring to acknowledged experts. But with S. 594 in place, there is little reason for the article III bench to be so deferential. If the courts are less deferential to agencies, that means more trials de novo, more appeals, more unpredictability, and more litigation. This is not good for public confidence in the agencies, and it is devastating to our already overcrowded Federal court docket.

Those who would lightly toss aside more than 40 years worth of tradition in the Administrative Procedure Act have a heavy burden of proof to carry. This burden has not nearly been met, in my view, by S. 594. In fact, the APA already affords ALJ's with *decisional* independence, and insulation from political pressures. And it is *decisional* independence that matters—rather than mere "perceptions" about office space, or parking privileges, whether the "seal" of the agency adorns the bench on which the judge sits, and so on. Inefficiency, increased bureaucracy and empire building are too high a price to pay to end any "perception" problem, in our view.

II. S. 594 is not Warranted by the Experience at the Social Security Administration or Any Other Agency

We are told we are to go through this exercise to redress a "public perception" of unfairness in the administrative process. To the extent this was ever true, the hearing record of four hearings before the Subcommittee on Administrative Practice show it to have been a problem at only one agency, the Social Security Administration.

Indeed, even this old allegation may not be valid when scrutinized. For example, *Nash* v. *Califano* has been cited before the subcommittee. 613 F.2d 10 (2d Cir. 1980) ("Nash I").

But this case held, at best, only that an ALJ had standing under the APA to challenge his own agency's practices. On the merits, after a lengthy pretrial discovery period, and after a 4-day trial supplemented by numerous depositions, the second circuit subsequently upheld the Social Security Administration's actions to increase the production levels of administrative law judges as "entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decisionmaking process." *Nash* v. *Bowen*, 869 F.2d 675, 681 (2d Cir. 1989).

Promoting quality and efficiency cannot "infringe" upon decisional independence, said a unanimous second circuit panel. Indeed, as the Court continued:

> Policies designed to insure a reasonable degree of uniformity among ALJ's are not only within the bounds of legitimate agency supervision, but are to be encouraged. Id. at 680.

The Court concluded:

> The bottom line in this case is that it was entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decision-making process.[2]

Moreover, you can be sure that *if* problems existed across the board, the committee would have heard from groups like labor or management, who appear before the NLRB; from broadcasters, listeners or viewers who appear before the FCC; from transportation carriers, passengers, shippers or receivers who appear before the ICC; from stock issuers, brokers or holders who appear before the SEC; from developers or homebuyers who appear before HUD; from meatpackers, supermarkets or consumers who appear before FTC, FDA, or CPSC; from manufacturers or employees who appear before the Labor Department or OSHA; or from chemical producers or environmentalists who appear before EPA; to name only a portion of those concerned with the administrative process and who now routinely appear before ALJ's.

We have not heard from these people because, unlike a few ALJ's, they are rather satisfied with current law.

III. Beyond the Policy Objections, S. 594 Promises a Host of More Practical Problems

There are over 30 departments and agencies that have cases decided by ALJ's. Under S. 594, the judges hearing those cases would be consolidated into a mere eight divisions. Not only would such consolidation dilute the expertise now available to those agencies, but also it would pit one agency against another in a quest to have cases heard promptly or on a priority basis. On the other hand, leaving ALJ's where they are presently assigned would preserve expertise, make available to the agencies a group of adjudicators dedicated to the prompt disposition of their caseloads, and continue reliance on a loan-type program which has successfully been utilized to make ALJ's available on a case-by-case basis to meet contingent needs.

Second, leaving judges in the agencies to which they are now assinged would be more efficient than separating them. It would minimize the handling and the need to transfer hundreds of thousands of files from the agencies to the Corps and back again to the agencies. It would eliminate any need to duplicate facilities, equipment, and personnel which now are shared by the agencies with their ALJ's. For example, agencies and ALJ's now share personnel and training specialists, budget analysts, financial and accounting man-

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[2] The majority report's citation of *Assn. of Administrative Law Judges* v. *Heckler* for the proposition that the SSA "coerced" ALJ's is inopposite. In this 1984 case, District Court Judge Joyce Hens Green awarded judgment to the agency, finding no evidence to support the perception of the complaining ALJ's. Whether ALJ's "felt" their decisional independence was imperiled is, of course, no substitute for proven facts.

agers and examiners, procurement and contract officers, computer specialists and technicians, and administrative and management services personnel. They also share libraries, files and records, computer hardware and software, mail and messenger services, travel offices, health units and storage facilities for equipment, furniture and supplies. The smaller the number of ALJ's compared to the total number of agency employees, the greater the unit cost would be to duplicate shared facilities, supplies and personnel.[3]

Third, consider the bureaucracy—the "empire"—created by this bill. Literally thousands of employees would serve under this new "Chief ALJ." The docket would consist of some 400,000 cases which affect the lives and regulate the corporate existence of those who now come under the jurisdiction of more than 30 departments and agencies. The chief judge, who would necessarily be an administrator and not an adjudicator, would be a Presidential appointee, and must be chosen from among sitting administrative law judges. This position would attract only the most political of a group which does not belong in a political sphere. If ALJ's currently decry invasion of their decisional independence by political interference, there is no reason to believe that their independence would be any greater under an extremely powerful and political chief judge who would be under tremendous pressure, at a minimum, to give priority and personnel to particular cases.

Fourth, S. 594 would grant ALJ's virtually lifetime tenure they were never intended to have, by insulating judges from reductions-in-force caused by changes in the law, deregulation, or budget considerations. Each of the past four decades has seen a reduction in the numbers of ALJ's at several agencies, such as the ICC, FTC, Interior Department, and CAB.

The bill, by folding all ALJ's into a common corps apart from the agencies, would keep the number of ALJ's artificially high. It would thwart meaningful reorganization efforts proposed by the President or Congress for the agencies.

IV. S. 594 Also Raises Serious Constitutional Questions

As reported, S. 594 would limit the President's authority in making appointments to the Council of the Corps in a manner that cannot be reconciled with the Constitution. Proposed section 583(a) specifies that the chief judge, who is to be appointed by the President, with the advice and consent of the Senate, "must be an [Administrative Law Judge] who has served as an [Administrative Law Judge] for at least five years preceding the date of appointment as Chief Judge." Proposed section 584(c)(2) specifies that the division chief judges, who are also to be Presidential appointees subject to Senate confirmation, "must have served as [Administrative Law Judges] for at least five years and should possess experience and expertise in the specialty of the division to which such person is an appointee."

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[3] As the Congressional Budget Office conservatively estimated with regard to S. 594:

> [T]he ALJ Corps, as an independent federal agency, would require its own support structure to manage personnel, budget, logistical, and other administrative matters. We expect the corps, with around 2,500 employees, would need at least 125 people in administrative positions, at a cost of around $10 million annually * * *

The appointments clause of the Constitution (Art. II, sec. 2, clause 2) requires that "officers of the United States," that is, those persons who exercise "significant authority pursuant to the laws of the United States," must be appointed by one of two means. An officer of the United States may be appointed by the President, by and with the advice and consent of the Senate, or the appointment of "inferior" officers in the executive branch may be vested by Congress in the President alone or in the heads of the executive branch departments. Since the Corps chief judge and division chiefs together constitute the Corps' Council, which would serve as the Corps' policymaking body, and individually each would exercise substantial administrative authority within the agency, it is clear that they would exercise significant authority under the laws of the United States. S. 594 would grant the President the authority, by and with the advice and consent of the Senate, to appoint these officials.

However, S. 594's additional requirements—that, in order to be eligible for appointment by the President, candidates must already be administrative law judges impermissibly infringes on the President's constitutional authority to appoint the officers that he deems to be suitable for the offices that Congress creates. In particular, we note that the requirement that candidates must be administrative law judges already limits the President's choice to a fixed and rather small number of people. The only check that the text of the Constitution places on the President's power of appointment for such "principal officers" is the advice and consent of the Senate.

V. The Metzenbaum Amendment Proves the Fundamental Flaw of S. 594

At committee markup of the bill, an amendment by Senator Metzenbaum was accepted, providing for new "Division 8" dealing with "financial services institutions." This amendment unintentionally points out one of the basic flaws of S. 594. The Metzenbaum amendment is premised on the fact that certain types of administrative proceedings—in this case involving Federal banking law—are too complex to leave to nonexpert ALJ's. Congress, when it passed the FIRREA legislation, knew this area was complicated, and that the only way to assure fairness to the litigants and faithfulness to the law was to have knowledgeable judges hear the case.

But in fact, *most* of the programs Congress creates are complex. And Congress has repeatedly stated that the implementation of the programs shouldn't be left to nonexperts. But that is just what S. 594 does—it intentionally leaves the decisions to nonexperts. S. 594 answers that ALJ's are merely "fungible commodities," like article III judges. But Congress specifically chose a different model when it created ALJ's. The model is not article III.

Rather, Congress chose a model that ensured that the person deciding the case would be well-versed in the relevant statutes and regulations—a person who would not need to be "educated" by the litigants—a person whose decision would be entitled to great weight precisely because he or she is an acknowledged expert.

So we have no quarrel specifically with the Metzenbaum amendment on the substance. We have no problem with making sure that experts will decide complex banking cases. But we are not prepared to say to a black lung claimant, or to a social security disability claimant, or to a radio license applicant at the FCC, or a nuclear power operator at the NRC, or the small businessman before the NLRB, that they are any less entitled to an expert deciding their case. We cannot concede that banking cases are more important to our constituents than other cases. We cannot support a system that would institutionalize "second class" justice for these with other types of claims before ALJ's. But that is what the committee bill sanctions.

VI. Conclusion

It is important to note that the Department of Justice, the Department of Health and Human Services, the Office of Personnel Management, the National Labor Relations Board, the Federal Energy Regulatory Commission, and the Forum of United States Administrative Law Judges all oppose the legislation.

For a host of reasons—policy, practical and constitutional, we oppose S. 594.

X. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 594, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic, existing law in which no change is proposed is shown in roman:)

UNITED STATES CODE

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions.
552. Public information; agency rules, opinions, orders, records, and proceedings.
552a. Records about individuals.[1]
552b. Open meetings.
553. Rule making.
554. Adjudications.
555. Ancillary matters.
556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.
557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.
558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.
559. Effect on other laws; effect of subsequent statute.

[1] Does not conform to section catchline.

SUBCHAPTER III--ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

571. Purpose.
572. Definitions.
573. Administrative Conference of the United States.
574. Powers and duties of the Conference.
575. Organization of the Conference
576. Appropriations.

SUBCHAPTER IV—ADMINISTRATIVE LAW JUDGE CORPS

581. Definitions.
582. Establishment; membership.

583. Chief administrative law judge.
584. Divisions of the Corps; division chief judges.
585. Council of the Corps.
586. Appointment and transfer of administrative law judges.
587. Jurisdiction.
588. Removal and discipline.

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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§ 573. Administrative Conference of the United States

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) the chief administrative law judge of the Administrative Law Judge Corps of the United States;

[(4)**]** *(5)* when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

[(5)**]** *(6)* individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

[(6)**]** *(7)* not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation.

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Subchapter IV—Administrative Law Judge Corps

§ 581. Definitions

For the purposes of this subchapter—

(1) "agency" means an authority referred to in section 551(1) of this title;

(2) "Corps" means the Administrative Law Judge Corps of the United States established under section 582 of this title;

(3) "administrative law judge" means an administrative law judge appointed under section 3105 of this title on or before the effective date of the Administrative Law Judge Corps Act or under section 586 of this title after such effective date;

(4) "chief judge" means the chief administrative law judge appointed and serving under section 583 of this title;

(5) "Council" means the Council of the Administrative Law Judge Corps established under section 585 of this title;

(6) "Board", unless otherwise indicated, means the Complaints Resolution Board established under section 588 of this title; and

(7) "division chief judge" means the chief administrative law judge of a division appointed and serving under section 584 of this title.

§ 582. Establishment; membership

(a) There is established an Administrative Law Judge Corps consisting of all administrative law judges, in accordance with the provisions of subsection (b). Such Corps shall be located in Washington, D.C.

(b) An administrative law judge serving as such on the date of the commencement of the operation of the Corps shall be transferred to the Corps as of that date. An administrative law judge who is appointed on or after the date of the commencement of the operation of the Corps shall be a member of the Corps as of the date of such appointment.

§ 583. Chief administrative law judge

(a) The chief administrative law judge shall be the chief administrative officer of the Corps and shall be the presiding judge of the Corps. The chief judge shall be appointed by the President, by and with the advice and consent of the Senate. The chief judge must be an administrative law judge who has served as an administrative law judge for at least five years preceding the date of appointment as chief judge. The chief judge shall serve for a term of five years or until a successor is appointed and qualifies to serve, whichever is earlier. A chief judge may be reappointed upon the expiration of his term, by and with the advice and consent of the Senate.

(b)(1) If the office of chief judge is vacant, the division chief judge who is senior in length of service as a member of the Council shall serve as acting chief judge until such vacancy is filled.

(2) If two or more division chief judges have the same length of service as members of the Council, the division chief judge who is senior in length of service as an administrative law judge shall serve as such acting chief judge.

(c) The chief judge shall, within ninety days after the end of each fiscal year, make a written report to the President and the Congress concerning the business of the Corps during the preceding fiscal year. The report shall include information and recommendations of the Council concerning the future personnel requirements of the Corps.

(d) After serving as chief judge, such individual may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 588 of this title.

§ 584. Divisions of the Corps; division chief judges

(a) Each judge of the Corps shall be assigned to a division by the Council, pursuant to section 585. The assignment of a judge who was an administrative law judge on the date of commencement of the operation of the Corps shall be made after consideration of the areas of specialization in which the judge has served. Each division shall be headed by a division chief judge who shall exercise administrative supervision over such division.

(b) The divisions of the Corps shall be as follows:

(1) Division of Communications, Public Utility, and Transportation Regulation.

(2) Division of Safety and Environmental Regulation.

(3) Division of Labor.

(4) Division of Labor Relations.

(5) Division of Health and Benefits Programs.

(6) Division of Securities, Commodities, and Trade Regulation.

(7) Division of General Programs.

(8) Division of Financial Services Institutions.

(c)(1) The division chief judge of each division set forth in subsection (b) shall be appointed by the President, by and with the advice and consent of the Senate.

(2) To be eligible for appointment as a division chief judge, an individual must have served as an administrative law judge for at least five years and should possess experience and expertise in the specialty of the division to which such person is an appointee.

(3) Division chief judges shall be appointed for five-year terms except that of those division chief judges first appointed, the President shall designate two such individuals to be appointed for five-year terms, three for four-year terms, and two for three-year terms.

(4) Any division chief judge appointed to fill an unexpired term shall be appointed only for the remainder of such predecessor's term, but may be reappointed as provided in paragraph (5).

(5) Any division chief judge may be reappointed upon the expiration of his term if nominated for such appointment pursuant to the provision of this title.

(6) Any judge, after serving as division chief judge may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 588 of this title.

§ 585. Council of the Corps

(a) The policymaking body of the Corps shall be the Council of the Corps. The chief judge and the division chief judges shall constitute the Council. The chief judge shall preside over the Council. If the chief judge is unable to be present at a meeting of the Council, the division chief judge who is senior in length of service as a member of such Council shall preside.

(b) One half of all of the members of the Council shall constitute a quorum for the purpose of transacting business. The affirmative vote by a majority of all the members of the Council shall be re-

quired to approve a matter on behalf of the Council. Each member of the Council shall have one vote.

(c) Meetings of the Council shall be held at least once a month at the call of the chief judge or by the call of one-third or more of the members of the Council.

(d) The Council is authorized—

(1) to assign judges to divisions and transfer or reassign judges from one division to another, subject to the provisions of section 586 of this title;

(2) to appoint persons as administrative law judges under section 586 of this title;

(3) to file charges seeking adverse action against an administrative law judge under section 588 of this title;

(4) subject to the provisions of subsection (e), to prescribe, after providing an opportunity for notice and comment, the rules of practice and procedure for the conduct of proceedings before the Corps, except that, with respect to a category of proceedings adjudicated by an agency before the effective date of the Administrative Law Judge Corps Act, the Council may not amend or revise the rules of practice and procedure prescribed by that agency during the two years following such effective date without the approval of that agency, and any amendments or revisions made to such rules shall not affect or be applied to any pending action;

(5) to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps and the implementation of this subchapter, including the assignment of cases to administrative law judges;

(6) subject to the civil service and classification laws and regulations, to select, appoint, employ, and fix the compensation of the employees (other than administrative law judges) that such Council deems necessary to carry out the functions, powers, and duties of the Corps and to prescribe the authority and duties of such employees;

(7) to establish, abolish, alter, consolidate, and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices;

(8) to procure temporary and intermittent services under section 3109 of this title;

(9) to enter into, to the extent or in such amounts as are authorized in appropriation Acts, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), contracts, leases, cooperative agreements, or other transactions that may be necessary to conduct the business of the Corps;

(10) to delegate any of the chief judge's functions or powers with the consent of the chief judge, or whenever the office of such chief judge is vacant, to one or more division chief judges or other employees of the Corps, and to authorize the redelegation of any of those functions or powers;

(11) to establish, after consulting with an agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the specialized field of law of that agency;

(12) to make suitable arrangements for continuing education and training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced; and

(13) to determine all other matters of general policy of the Corps.

(e) The Council shall select an official seal for the Corps which shall be officially noticed.

§ 586. Appointment and transfer of administrative law judges

(a) After the initial establishment of the Corps, the Council shall appoint new or additional judges as may be necessary for the efficient and expeditious conduct of the business of the Corps. Appointments shall be made from a register maintained by the Office of Personnel Management under subchapter I of chapter 33 of this title. Upon request by the chief judge, the Office of Personnel Management shall certify enough names from the top of such register to enable the Council to consider five names for each vacancy. Notwithstanding section 3318 of this title, a vacancy in the Corps may be filled from the highest five eligible individuals available for appointment on the certificate furnished by the Office of Personnel Management.

(b) A judge of the Corps may not perform or be assigned to perform duties inconsistent with the duties and responsibilities of an administrative law judge.

(c) A judge of the Corps on the date of commencement of the operation of the Corps may not thereafter be involuntarily reassigned to a new permanent duty station if such station is beyond commuting distance of the duty station which is the judge's permanent duty station on that date, unless the Council determines and submits a written explanation to the judge stating that such reassignment is required to meet substantial changes in workloads. A judge may be temporarily detailed, once in a 24-month period, to a new duty station at any location, for a period of not more than 120 days.

§ 587. Jurisdiction

(a) All types of cases, claims, actions and proceedings heretofore held before administrative law judges shall be referred to the Corps, for adjudication on the record after an opportunity for a hearing.

(b) An administrative law judge who is a member of the Corps shall hear and render a decision upon—

(1) every case of adjudication subject to the provisions of section 553, 554, or 556 of this title;

(2) every case in which hearings are required by law to be held in accordance with section 554 or section 556 of this title; and

(3) every other case referred to the Corps by an agency or court in which a determination is to be made on the record after an opportunity for a hearing.

(c) When a case under subsection (b) arises, it shall be referred to the Corps. Under regulations issued by the Council the case shall be assigned to Division. The appropriate Division Chief shall assign cases to judges, taking into consideration specialization, training, workload, and conflicts of interest.

(d) Federal agencies and courts are hereby authorized to refer any appropriate case either—

(1) to the Corps; or

(2) to a specific administrative law judge, with the approval of the majority of the Council, to serve as a special master pursuant to the provisions of rule 53(a) of the Federal Rules of Civil Procedure.

(e) Compliance with this subchapter shall satisfy any and all requirements imposed under section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989.

§ 588. Removal and discipline

(a) Except as provided in subsection (b) of this section—

(1) an administrative law judge may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty, but may be removed for physical or mental disability; and

(2) an action specified in paragraph (1) of this subsection may be taken against an administrative law judge only after the Council has filed a notice of adverse action against the administrative law judge with the Merit Systems Protection Board and the Board has determined, on the record after an opportunity for a hearing before the Board, that there is good cause to take such action.

(b) Subsection (a) does not apply to an action initiated under section 1206 of this title.

(c) Under regulations issued by the Council, a Complaints Resolution Board shall be established within the Corps to consider and to recommend appropriate action to be taken when a complaint is made concerning the official conduct of a judge. Such complaint may be made by any interested person, including parties, practitioners, the chief judge, and agencies.

(d) The Board shall consist of two judges from each division of the Corps who shall be appointed by the Council. The chief judge and the division chief judges may not serve on such Board.

(e) A complaint of misconduct by an administrative law judge must be made in writing. The complaint shall be filed with the chief judge, or it may be originated by the chief judge on his own motion. The chief judge shall refer the complaint to a panel consisting of three members of the Board selected by the Council, none of whom may be serving in the same division as the administrative law judge who is the subject of the complaint. The administrative law judge who is the subject of the complaint shall be given notice of the complaint and the composition of the panel. The administrative law judge may challenge peremptorily not more than two members of the panel. The Council shall replace a challenged member with another member of the Board who is eligible to serve on such panel.

(f) The panel shall inquire into the complaint and shall render a report thereon to the Council. A copy of the report shall be provided concurrently to the administrative law judge who is the subject of the complaint. The report shall be advisory only.

(g) The proceedings, deliberations, and reports of the Board and the contents of complaints under this section shall be treated as

privileged and confidential. Documents considered by the Board and reports of the Board are exempt from disclosure or publication under section 552 of this title. Section 552b of this title does not apply to the Board.

CHAPTER 31—AUTHORITY FOR EMPLOYMENT

[§ 3105. Appointment of hearing examiners

[Each agency shall appoint as many hearings examiners as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Hearing examiners shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners.]

§ 3105. Appointment of administrative law judges

Administrative law judges shall be appointed by the Council of the Administrative Law Judge Corps pursuant to section 586 of this title.

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CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

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SUBCHAPTER III—DETAILS

Sec.
3341. Details; within Executive or military departments.
[3342. Repealed.]
3343. Details; to international organizations.
[3344. Details; hearing examiners.]
3345. Details; to office of head of Executive or military department.
3346. Details; to subordinate offices.
3347. Details; Presidential authority.
3348. Details; limited in time.
3349. Details; to fill vacancies; restrictions.

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[§ 3344. Details; hearing examiners

[An agency as defined by section 551 of this title which occasionally or temporarily is insufficiently staffed with hearing examiners appointed under section 3105 of this title may use hearing examiners selected by the Civil Service Commission from and with the consent of other agencies.]

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CHAPTER 75—ADVERSE ACTIONS

SUBCHAPTER I—SUSPENSION OF 14 DAYS OR LESS

Sec.
7501. Definitions.
7502. Actions covered.
7503. Cause and procedure.
7504. Regulations.

SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

7511. Definitions; application.
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[SUBCHAPTER III—ADMINISTRATIVE LAW JUDGES

[7521. Actions against administrative law judges.]

SUBCHAPTER [IV] *III*—NATIONAL SECURITY

7531. Definitions.
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SUBCHAPTER [V] *IV*—SENIOR EXECUTIVE SERVICE

7541. Definitions.
7542. Actions covered.
7543. Cause and procedure.

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[Subchapter III—Administrative Law Judges

[HISTORICAL NOTE

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[§ 7521. Actions against administrative law judges

[(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

[(b) The actions covered by this section are—

[(1) a removal;

[(2) a suspension;

[(3) a reduction in grade;

[(4) a reduction in pay; and

[(5) a furlough of 30 days or less;

do not include—

[(A) a suspension or removal under section 7532 of this title;

[(B) a reduction-in-force action under section 3502 of this title; or

[(C) any action initiated under section 1206 of this title.

Added Pub. L. 95-454, Title II, § 204(a), Oct. 13, 1978, 92 Stat. 1137.]

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